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No. 90-747

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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In this case under the Freedom of Information Act (FOIA), respondents seek to obtain names and other information that would identify Haitian citizens who were interviewed, on a confidential basis by State Department personnel in Haiti in the course of monitoring the Haitian Government's compliance with its agreement not to persecute persons returned to that country by the United States. The question presented is:

> Whether the names and other information identifying the individual Haitian citizens who consented to be interviewed by State Department personnel are protected against mandatory disclosure by FOIA Exemption 6, which applies to matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	12
Argument:	
I. Disclosure of the Haitians' identities would not advance the purposes of the Freedom of Information Act	14
A. To accommodate the "fullest responsible disclosure" of government records, the FOIA permits the redaction of personal identification information	14
B. The disclosure of personal identities to provide Freedom of Information Act requesters a means of obtaining information outside the government files is contrary to Exemption 6	20
II. Even if there were some cognizable "public interest" in the identities of the Haitians who were interviewed, the severe intrusion on personal privacy that would result from disclosure would be clearly unwarranted	27
Conclusion	34

TABLE OF AUTHORITIES

Cases:

AFGE, Local 1923 v. *HHS*, 712 F.2d 931 (4th Cir. 1983)	28
Department of the Air Force v. *Rose*, 425 U.S. 352 (1976)	10, 11, 14, 17, 22, 24, 30
Department of State v. *Washington Post Co.*, 456 U.S. 595 (1982)	29, 30
Durns v. *Bureau of Prisons*, 804 F.2d 701 (D.C. Cir. 1986), vacated and remanded, 486 U.S. 1029 (1988)	26

Cases—Continued: Page

EPA v. *Mink*, 410 U.S. 73 (1973) 12, 14, 16, 19, 25
FLRA v. *United States Department of the Treasury*, 884 F.2d 1466 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 863 (1990) 18, 28
Halloran v. *Veterans Administration*, 874 F.2d 315 (5th Cir. 1989) 20
Heckler v. *Mathews*, 465 U.S. 728 (1984) 33
Heights Community Congress v. *Veterans Administration*, 732 F.2d 526 (6th Cir.), cert. denied, 469 U.S. 1034 (1984) 28, 31
Hopkins v. *HUD*, No. 90-9269 (2d Cir. Apr. 1, 1991) 22, 23
INS v. *Stevic*, 467 U.S. 407 (1984) 3
Kissinger v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980) 24
KTVY v. *United States*, 919 F.2d 1465 (10th Cir. 1990) 20
Miller v. *Bell*, 661 F.2d 623 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982) 20-21
Minnis v. *Department of Agriculture*, 737 F.2d 784 (9th Cir. 1984) 28
National Ass'n of Retired Federal Employees v. *Horner*, 879 F.2d 873 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1805 (1990) 18, 23, 27, 28
Olmstead v. *United States*, 277 U.S. 438 (1928) 28
Reed v. *NLRB*, No. 90-5147 (D.C. Cir. Mar. 15, 1991) 24
Ripskis v. *HUD*, 746 F.2d 1 (D.C. Cir. 1984) 28
Robles v. *EPA*, 484 F.2d 843 (4th Cir. 1973) 32
SafeCard Services, Inc. v. *SEC*, 926 F.2d 1197 (D.C. Cir. Mar. 1, 1991) 24
United States Department of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ..... *passim*
United States Department of State v. *Washington Post Co.*, 456 U.S. 595 (1982) 5
Washington Post Co. v. *Department of Health & Human Services*, 690 F.2d 252 (D.C. Cir. 1982) 31
Wine Hobby USA, Inc. v. *IRS*, 502 F.2d 133 (3d Cir. 1974) 28

Treaties, statutes, regulations, and rule: Page

Agreement on Migrants—Interdiction, Sept. 23, 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241 3
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 3
Arts. 2-34, 19 U.S.T. 6261-6276 3
Art. 33, 19 U.S.T. 6276 3
United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 2
Art. 1.2, 19 U.S.T. 6225 3
Davis-Bacon Act, 40 U.S.C. 276a *et seq.* 23
Freedom of Information Act:
5 U.S.C. 552 ..... 2, 4
5 U.S.C. 552(a) 14
5 U.S.C. 552(a)(3) 25
5 U.S.C. 552(a)(4)(B) 24
5 U.S.C. 552(b) 14, 16
5 U.S.C. 552(b)(1) 7, 32
5 U.S.C. 552(b)(1)(A) 32
5 U.S.C. 552(b)(6) ..... *passim*
5 U.S.C. 552(b)(7)(C) 7, 11, 15, 17, 18
5 U.S.C. 552(b)(7)(D) 7, 11
5 U.S.C. 1002 (1964) 25
8 U.S.C. 1157 33
8 U.S.C. 1158 33
Exec. Order No. 12,324 (46 Fed. Reg. (1981)):
p. 48,107 2
p. 48,109 2
Exec. Order No. 12,356 (47 Fed. Reg. (1982)):
p. 14,874 8
p. 14,876 ..... 9, 32
Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981) 2
Fed. R. Civ. P. 59(e) 7

Miscellaneous:

Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596 (1976) 25

Miscellaneous—Continued:	Page
Department of State, *Country Reports of Human Rights Practices*:	
1985	3
1986	3
1987	3
1988	3
1989	3
1990	3
H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966)	5, 16, 19, 24
S. Rep. No. 813, 89th Cong., 1st Sess. (1965)	12, 14, 16, 22
Webster's Third New International Dictionary 1804 (1976)	33

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 908 F.2d 1549. The orders of the district court (Pet. App. 25a-30a, 31a-33a) are reported at 725 F.Supp. 502 and 505.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990, and a petition for rehearing was denied on October 12, 1990. Pet. App. 34a-35a. The petition for a writ of certiorari was filed on November 13, 1990, and was granted on March 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, are set forth at Pet. App. 38a-39a.

STATEMENT

1. In Proclamation No. 4865 of September 29, 1981, President Reagan concluded that "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" is "a particularly difficult aspect" of a "serious national problem." 46 Fed. Reg. 48,107. To combat this rampant evasion of the Nation's immigration laws, the President directed the Coast Guard to interdict certain vessels carrying undocumented aliens and to return those vessels and passengers to their point of origin. Exec. Order No. 12,324 (46 Fed. Reg. 48,109 (1981)). Additionally, the Secretary of State was directed by the President to enter into "cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States." *Ibid.* The President specifically admonished that the interdiction program was to be implemented with "strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." *Id.* at 48,110. The Executive Order thus provides, with respect to interdicted vessels, "that no person who is a refugee will be returned without his consent." *Id.* at 48,109.[1]

[1] See United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268. The United States acceded to the Protocol in 1968. 19 U.S.T. 6223, T.I.A.S. No. 6577. Article 1.2 of the Protocol defines a "refugee" as a person who is out of his country due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." 19 U.S.T. 6261.

The Protocol obligates the United States to comply with the substantive requirements of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. 19 U.S.T. 6225. As pertinent here, Article 33.1 of the Convention provides (19 U.S.T. 6276): "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." See *INS* v. *Stevic*, 467 U.S. 407, 417 (1984).

Haiti, an impoverished nation with a lengthy history of political repression,[2] has been a source of significant illegal immigration into the United States. On September 23, 1981, the State Department, acting pursuant to Exec. Order No. 12,324, therefore entered into an arrangement with Haiti for cooperative efforts in the high seas interdiction program. See Agreement on Migrants—Interdiction, Sept. 23, 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241. As part of that agreement, the State Department obtained assurances from Haiti that inter-

[2] Haiti suffered for 29 years under the notorious "Papa Doc" and "Baby Doc" Duvalier dictatorships, followed by five years of military rule. Haiti's human rights record is documented in the State Department's annual *Country Reports of Human Rights Practices*, which are published as Joint Committee Prints by the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. See *Reports* for 1985 (pp. 571-81), 1986 (pp. 533-40), 1987 (pp. 510-19), 1988 (pp. 598-607), 1989 (pp. 620-27), and 1990 (pp. 656-664). Recent developments in Haiti are more hopeful. On February 7, 1991, Haiti inaugurated Rev. Jean-Betrand Aristide, the first popularly elected President in Haiti's 187-year history.

dicted Haitians would not be persecuted by their government for illegal departure. *Ibid.* The State Department further advised Haiti that persons determined by the United States "to qualify for refugee status" would not be returned to Haiti. *Ibid.*

Beginning in 1981, the State Department monitored Haiti's compliance with its agreement not to persecute persons involuntarily returned to that country. Upon the return of interdicted vessels to Port-Au-Prince, U.S. Embassy officials obtained the names and addresses of returnees. Approximately six months afterwards, State Department personnel located in Haiti conducted interviews with a representative sample of the returnees. To obtain the most candid and reliable responses, the interviews "were conducted with the clear understanding that they would be held confidential." J.A. 56. The Haitians "were informed that the purpose of the * * * interviews was to monitor the well-being of the returnees." *Ibid.* These interviews confirmed that Haiti has not persecuted or mistreated its nationals for attempted unlawful immigration into the United States. J.A. 42-43.

2. Respondent Michael Ray, a Miami, Florida lawyer, brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. 552, on his own behalf and on behalf of three Haitian nationals seeking political asylum in the United States. J.A. 14-27. Respondents previously had filed FOIA requests with the Department of State seeking "copies and listings of the reports and trips to Haiti" made by State Department personnel. J.A. 21. The State Department released 25 documents, but deleted from 17 of those documents the names and other information that would identify individual Haitians who had been interviewed following their return to Haiti. The

State Department withheld the information under FOIA Exemption 6 (Pet. App. 26a), which provides that the disclosure requirements of FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).[3]

The State Department filed a motion for summary judgment on the Exemption 6 claim, supported by the affidavit of John Eaves, the Acting Deputy Director of the Office of Mandatory Review of the State Department's Classification and Declassification center. J.A. 40. Mr. Eaves explained that the 17 redacted documents were reports from Haiti of confidential interviews by State Department personnel of Haitian nationals who had been involuntarily returned to Haiti following unsuccessful attempts to enter the United States without documentation. The interviews were conducted to determine whether the individuals had been mistreated by Haitian authorities upon their return. J.A. 42. Respondents alleged that they needed the information for use in their deportation proceedings, in order to assist them in showing that they would be subject to persecution if they were returned to Haiti. Pet. App. 3a-4a. Mr. Eaves explained, however, that the State Department had released the substance of the reports in their

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[3] The term "similar files" in Exemption 6 is not limited "to a narrow class of files containing only a discrete kind of personal information." *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). Instead, it applies broadly to any "detailed Government records on an individual which can be identified as applying to that individual." *Ibid.* (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)). It is not disputed in this case that the Haitian interview reports constitute "similar files" within the meaning of Exemption 6.

entirety and that the names and other identifying information were withheld in order "to protect the privacy of Haitians who consented to interviews by Embassy officers" (J.A. 42-43):

> While no evidence of harassment or ill treatment of the returned Haitians was reported, those who were interviewed consented to the procedures with the understanding that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality. To disclose the identities of these individuals would not only betray their trust in our discretion, it would also subject them or their families to possible embarrassment in their social and community relationships. This would be a clearly unwarranted invasion of the privacy of the individuals concerned.

3. On March 3, 1989, the district court issued its order rejecting the State Department's effort to protect the identities of the Haitian interviewees under FOIA Exemption 6. Pet. App. 25a-30a. The district court noted that, in determining whether disclosure would result in a clearly unwarranted invasion of personal privacy, it was required to "employ a balancing test, weighing an individual's right of privacy against the public right to disclosure of government information." *Id.* at 28a. Treating "[t]he promise of confidentiality by the State [Department]" as "only one factor to be considered," the court found the privacy interests at stake in this case to be "de minimis and little more than speculation." *Id.* at 29a. On the other side of the balance, the court stated that "this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians." *Ibid.* The court concluded that the balance "tilts" in favor of disclosure

of the names and other information identifying the individual Haitians who had consented to be interviewed, even though those interviews were conducted under the State Department's promise of confidentiality. *Ibid.* The court therefore ordered the State Department to release that information within 15 days, although it withheld entry of final judgment until after expiration of that period. *Ibid.*[4]

4. On March 17, 1989, the State Department moved for reconsideration,[5] arguing that the identities of the Haitian nationals are protected not only by FOIA Exemption 6, but also by Exemptions 1, 7(C) and 7(D), 5 U.S.C. 552(b)(1), (7)(C) and (7)(D). Those exemptions provide that FOIA does not apply (i) to matters that are properly classified pursuant to Executive Order of the President or (ii) to law enforcement information the release of which could reasonably be expected either to constitute an

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[4] Respondents also sought to obtain an alleged list of 600 individuals who had been returned to Haiti and had not been persecuted. The State Department and Immigration and Naturalization Service concluded, however, that no such list existed. Both courts below found the agencies' searches for the alleged list to have been adequate. Pet. App. 16a-20a, 26a-27a. In addition, respondents requested the district court to certify a class of all black Haitian citizens in exclusion and deportation proceedings who would present asylum claims and to enjoin those proceedings until six months after respondents obtained the information they sought under the FOIA. The district court, affirmed by the court of appeals, refused to certify a class and dismissed respondents' request for injunctive relief. *Id.* at 5a, 15a-16a, 21a-24a, 29a n.3, 36a-37a. Those issues are not involved here.

[5] Although the district court had withheld entry of final judgment (Pet. App. 29a), the motion was styled a Motion to Alter or Amend Judgment and was filed pursuant to Fed. R. Civ. P. 59(e).

unwarranted invasion of personal privacy or to disclose the identity of a confidential source.

The motion for reconsideration was supported by the declaration of Richard H. Melton, the Deputy Assistant Secretary of State for Inter-American Affairs. J.A. 53. Mr. Melton reconfirmed that the interviews "were conducted with the clear understanding that they would be held confidential" (J.A. 56, 57):

> If Haitians interviewed had been aware that their names and statements could be made public and might be used in political asylum proceedings, either on behalf of or against fellow Haitians, the interviewees might have been far less candid in nature. Had the U.S. government not been able to assure confidentiality of the names of interviewees, the United States would have been severely handicapped in its ability to obtain the information necessary to assess the success of its agreement with Haiti and the interdiction program.

Mr. Melton further explained that, if the "essential trust" that the United States would "protect the identity of sources of information" were breached,

> [o]ther Haitians or third country nationals on whom the United States relies for candid and frank assessments of internal conditions would be reluctant to believe in a U.S. promise of confidentiality, and thus no longer be willing to provide the U.S. information it needs to effectively conduct law enforcement programs or to attain foreign policy objectives.

J.A. 56-57. For these reasons, he stated (J.A. 57) that the documents were being reviewed for classification pursuant to Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982).

On March 27, 1989, the State Department informed the court in a supplemental memorandum that, following the review instituted by Deputy Assistant Secretary Melton, the identities of the Haitian nationals had been classified. That memorandum was accompanied by the declaration of Pratt Byrd, the Acting Deputy Director of the Office of Mandatory Review in the State Department's Classification and Declassification Center, who explained that the interview reports are proper subjects of classification because they constitute information concerning "foreign relations or foreign activities of the United States" and involve a "confidential source." Accordingly, the names had been classified because their release "reasonably could be expected to cause damage to the national security" of the United States. J.A. 61, 62 (quoting Exec. Order No. 12,356, 47 Fed. Reg. 14,876 (1982).

The district court chose not to address the merits of the State Department's submission. Instead, the court held that the State Department had waived its FOIA Exemption 1 and Exemption 7 claims by failing to raise them until after the court had ordered disclosure. Pet. App. 31a-33a.

5. The court of appeals affirmed. In addressing the Exemption 6 issue, the court thought it "important to candidly acknowledge that it appears that [respondents] seek the redacted information so that they can contact directly the Haitians who were interviewed by American officials and question them about how they are treated by the Haitian government since attempting to flee to the United States." Pet. App. 7a. "In light of that fact," the court found it "difficult to characterize this invasion of the Haitian returnees' privacy to be no more than de minimis,"

as the district court had done. *Ibid.* The court also noted that "the returnees were promised confidentiality before they talked with U.S. government officials," a factor that, while it may not mandate the withholding of the names of the persons who were interviewed, "adds weight to the privacy interests at stake." *Id.* at 7a-8a. For these reasons, the court of appeals "beg[a]n the balancing process" by "acknowledging that there are significant privacy interests at stake here." *Id.* at 8a.

Nevertheless, while regarding it as a "close question," the court held that disclosure was required because the significant privacy interests affected were outweighed by a legitimate public interest in disclosure. The court agreed with the State Department that respondents' desire to use the information in resisting deportation did not justify disclosure because the goal of FOIA is "to open agency action to the light of public scrutiny," not to further "private purposes." Pet. App. 8a-9a (quoting *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976)). The court determined, however, that respondents had a proper interest in obtaining "the information in order to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees." Pet. App. 9a. The court found it significant that respondents "dispute the view expressed publicly by some government officials that Haiti is adhering to its promise not to punish returnees, and they seek information that will assist them in testing the accuracy of that information." *Ibid.*

The court acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell plaintiffs anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." *Ibid.* But the court found it sufficient that release of the names "will give [respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." *Ibid.* The court viewed this case as different in this respect from *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), in which this Court upheld the government's refusal to disclose the inherently personal information in criminal "rap sheets," because respondents in this case "seek information about individuals that will help them scrutinize what our government is doing and saying regarding Haitians who unsuccessfully attempt to flee to this country." Pet. App. 12a.

The court of appeals also affirmed the district court's ruling that the State Department had waived its right to rely on Exemptions 1, 7(C) and 7(D) by failing to raise those arguments prior to the district court's rejection of its Exemption 6 claim. Pet. App. 13a-15a.

On October 12, 1990, the court of appeals denied the State Department's petition for rehearing and suggestion for rehearing en banc. Pet. App. 34a-35a. On March 4, 1991, this Court granted the State Department's petition for a writ of certiorari, limited to the question presented in the petition under FOIA Exemption 6.

SUMMARY OF ARGUMENT

I. The central purpose of the Freedom of Information Act is not simply to provide the fullest possible disclosure of documents in the government's possession. Rather, the central purpose of FOIA is to provide the "fullest *responsible* disclosure" of government documents. See *EPA* v. *Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (emphasis added)). In providing for "responsible disclosure," Congress intended the courts to achieve an accommodation that "balances, and protects all interests" that the FOIA exemptions recognize. *Ibid.*

The balance struck by Congress in FOIA Exemption 6 is that information constituting a "clearly unwarranted invasion of personal privacy" is not to be disclosed. 5 U.S.C. 552(b)(6). In determining whether a disclosure constitutes a "clearly unwarranted invasion of personal privacy," Congress intended that both the public need for responsible disclosure and the personal need for privacy would be protected by the agencies and by the courts.

Here, the Department of State properly balanced these interests by providing the requested Haitian interview reports while redacting the names (and limited other information) that would identify the particular individuals who were interviewed. The redaction of the names and other identifying information was "unquestionably appropriate because the names of the particular" persons interviewed "were irrelevant to the inquiry into the way" the State Department was administering its responsibilities. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). "[D]isclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Id.* at 765.

This Court emphasized in *Reporters Committee* that, while there is a public interest in the disclosure of information that "directly" reveals the government's conduct of its affairs, the names and identities of private citizens found in government records "reveals little or nothing about an agency's own conduct." 489 U.S. at 773. Because disclosure of private information in the government's files reveals nothing directly about the conduct of government, "it should come as no surprise" that this Court has consistently rebuffed all efforts to secure such information. *Id.* at 774 & n.21.

II. The privacy interest in protecting the names of the Haitian interviewees from disclosure in this case arises in an unusually sensitive setting. The State Department reports identify these individuals as persons who suffer extreme poverty, who have a desire to leave their country, who have engaged in unlawful immigration activity in the past, and who are willing to talk about their relations with their own government with diplomatic representatives of the United States. The interview reports contain details about the individuals, their employment, their education, and their domestic situations. All of this information was obtained under pledges of confidentiality from representatives of the United States. The privacy interests at issue in this case are certainly no less substantial than those considered by the Court in its prior FOIA decisions, particularly in view of respondents' admitted intent to track down these persons and interrogate them further. The invasion of personal privacy in this case is so severe, and the public need for disclosure so conjectural and attenuated, that the Act's objective of "responsible disclo-

sure" would be defeated by providing the information that respondents seek.

ARGUMENT

I. DISCLOSURE OF THE HAITIANS' IDENTITIES WOULD NOT ADVANCE THE PURPOSES OF THE FREEDOM OF INFORMATION ACT

A. To Accommodate The "Fullest Responsible Disclosure" Of Government Records, The FOIA Permits The Redaction Of Personal Identification Information

The Freedom of Information Act could accurately be described as a general mandate for disclosure that is modified by a list of specific and detailed exemptions. 5 U.S.C. 552(a) and (b). While this bare description of the statute is literally correct, it represents a "cramped" view of the careful balancing of interests that Congress sought to accomplish in the Act. Cf. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 776. The guiding principle for the proper application of the detailed exemptions from disclosure afforded by the Act is that the courts are to accommodate the "fullest responsible disclosure" that "balances, and protects all interests." *EPA* v. *Mink*, 410 U.S. at 80 (quoting S. Rep. No. 813, *supra*, at 3). See also *Department of the Air Force* v. *Rose*, 425 U.S. at 361-362.

The specific exemption at issue in this case addresses the need to safeguard personal privacy from unwarranted disclosure of personal information located in government files. FOIA Exemption 6 provides that the disclosure requirement of the Act "does not apply" to "personnel and medical files and similar files the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6); see note 3, *supra*.[6] Congress perceived that the evident harm caused by the disclosure of personal information could well exceed the public benefit, if any, of such disclosure. In an important passage from the Senate Report that preceded enactment of FOIA, which has been cited by this Court in each of its FOIA decisions addressing privacy issues, the following guidance was provided:

> At the same time a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.
>
> It is not an easy task to balance the opposing interests, but it is not an impossible one either. *It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated.* Success lies in providing a workable formula which encompasses, balances, and protects all

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[6] Similarly, Exemption 7(C) removes from the disclosure requirements of the Act "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). In granting certiorari in this case, the Court declined review of the holding of the courts below that reliance on Exemption 7(C) was waived by the State Department in this case.

> interests, yet places emphasis on the fullest responsible disclosure.

S. Rep. No. 813, *supra*, at 3 (emphasis added). Congress thus deemed protection of the "equally important rights of privacy" to be fully compatible with the Act's disclosure requirement. While personal privacy is fully protected, the agencies and the courts may still accomplish "the fullest responsible disclosure." *Ibid.*

The House Report on the Act further explains how the policies of privacy and responsible disclosure can be reconciled:

> The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. *The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual* and *not* the facts concerning the award of a pension or benefit or *the compilation of unidentified statistical information from personal records.*

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added). The "workable formula" (*EPA* v. *Mink*, 410 U.S. at 80) that Congress intended to apply in providing for the fullest responsible disclosure of government records is thus achieved by permitting the release of the information compiled by the government, so long as anonymity is maintained. The statute specifically provides in this regard that protected information may be redacted, while the balance of the document is produced. 5 U.S.C. 552(b).

See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 766 (the provisions in FOIA allowing redaction reflect "a congressional understanding that disclosure of records containing personal details about private citizens can infringe significant privacy interests"); *Department of the Air Force* v. *Rose*, 425 U.S. at 374.

This Court's decisions construing Exemption 6 comport with these expressions of congressional intent. In *Department of the Air Force* v. *Rose*, legal scholars researching the disciplinary procedures at the military academies for a law review article sought the case summaries of the honors and ethics hearings with the names and other identifying personal information redacted. The government argued that the case summaries should be withheld in their entirety. The Court held, however, that "nonconfidential matter" contained in personnel records or similar files "was not to be insulated from disclosure." 425 U.S. at 372. The Court emphasized that disclosure, " 'with personal references and other identifying information deleted,' respected the confidentiality interests embodied in Exemption 6." *Id.* at 380.

Most recently, the Court denied, as an unwarranted invasion of privacy under Exemption 7(C), the disclosure requested by journalists of criminal "rap sheets" for specific, named individuals. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, *supra*. The Court initially noted that the language employed to protect privacy under Exemption 7(C) differs from that found in Exemption 6 (489 U.S. at 756; see note 6, *supra*) and that "the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law-enforcement pur-

poses is somewhat broader than the standard applicable to personnel, medical, and similar files." *Ibid.* While the standard differs "somewhat," the analytic framework for the evaluation of privacy invasion under both Exemption 6 and Exemption 7(C) was the same. 489 U.S. at 768-769.[7]

As explained in *Reporters Committee*, the personal privacy interest that had been "doubly stressed" by the Court in *Department of the Air Force* v. *Rose* was anonymity: "We praised the [Air Force] Academy's tradition of protecting personal privacy through the redaction of names from the case summaries * * * and approved the Court of Appeals' rule permitting the District Court to delete 'other identifying information' in order to safeguard this privacy interest." 489 U.S. at 769. In *Reporters Committee*, the Court emphasized that the refusal to provide information on identifiable private individuals created no conflict with the FOIA's overall disclosure policies. "[T]he FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Id.* at 774.[8]

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[7] See also *FLRA* v. *United States Department of the Treasury*, 884 F.2d 1446, 1451-1452 (D.C. Cir. 1989) (disclosure of employee names and addresses to union violates privacy interests protected by Exemption 6), cert. denied, 110 S.Ct. 863 (1990); *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 874-875 (D.C. Cir. 1989) (disclosure of status as retirement-eligible federal employee violates privacy interests protected by Exemption 6), cert. denied, 110 S.Ct. 1805 (1990).

[8] The Court gave the following example: " 'The public has a need to know * * * the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public.' Both public relief and income tax assessments—like law enforcement—are proper subjects of public concern. But just as the *identity* of the individuals given public relief or involved in tax matters *is irrelevant* to the public's understanding of the Government's operation, so too is the identity of the individuals who are the subjects of rap sheets irrelevant to the public's understanding." 489 U.S. at 766 n.18 (emphasis added) (quoting from H.R. Rep. No. 1497, *supra*, at 8).

The FOIA "create[s] a right of access to 'official information,' " so that the people may be "informed about 'what their government is up to.' " *Ibid.* (quotin *EPA* v. *Mink*, 410 U.S. at 80, 105 (Douglas, J., dissenting)). While there is a public interest in the disclosure of information that "directly" reveals the government's conduct of its affairs, "[t]hat purpose * * * is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." 489 U.S. at 773. The deletion of personal identification information from government reports is thus "unquestionably appropriate because the names of the particular" persons involved are "irrelevant to the inquiry into the way the" government administers its responsibilities. *Ibid.* As this Court held in *Reporters Committee*, "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." 489 U.S. at 765.

B. The Disclosure Of Personal Identities To Provide Freedom Of Information Act Requesters A Means Of Obtaining Information Outside Of Government Files Is Contrary To Exemption 6

By releasing the redacted interview reports, the State Department provided respondents with the substantive information of significance concerning the manner in which the government is conducting its affairs. These documents reveal the procedures employed by the State Department to monitor Haiti's compliance with its undertakings concerning the treatment of interdicted Haitian nationals. They further reveal the specific information obtained by the State Department in conducting the interviews, and they reveal whether the interviews confirm or call into question the Department's views concerning Haitian compliance. The State Department's deletion of the names and other identifying information from the text of the reports directly follows the course mapped out by this Court in *Department of the Air Force* v. *Rose*. It was "unquestionably appropriate" for the State Department to delete the names of the individual Haitians from the interview summaries released to respondents because the names were "irrelevant" to an understanding of the manner in which the government was supervising and administering the interdiction program. See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 773. Here, as in *Rose* and in *Reporters Committee*, "leaving the identifying material in the summaries would therefore have been a 'clearly unwarranted' invasion of individual privacy." *Id.* at 773-774. See also *KTVY* v. *United States*, 919 F.2d 1465, 1469 (10th Cir. 1990); *Halloran* v. *Veterans Administration*, 874 F.2d 315, 324 (5th Cir. 1989); *Miller* v. *Bell*, 661 F.2d 623, 630-631 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

The court of appeals frankly acknowledged that "the disclosure of the Haitians' names and addresses, in and of itself, will not tell [respondents] anything about Haiti's treatment of its returnees or the U.S. government's honesty about the matter." Pet. App. 9a. Even though there was thus no discernible public interest in the disclosure of the personal information "in and of itself," the court of appeals nevertheless ordered disclosure under the rationale that "the identifying information will give [respondents] a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." *Ibid.*

The reasoning adopted by the court of appeals cannot be reconciled with this Court's decisions nor with the evident congressional purpose in adopting Exemption 6. The "derivative use" theory created by the court of appeals—which justifies the disclosure of private information on the rationale that doing so would permit the requester to check the accuracy of the government's records at their source—would stand this Court's decisions on their head, creating an exception that swallows the rule of *Rose* and *Reporters Committee*.

1. The "derivative use" theory invites wholesale circumvention of the important protection afforded to personal privacy under the FOIA. In *Rose*, for example, if this Court had applied the reasoning adopted by the court of appeals in this case, and if the requesters had represented that they planned to contact the current and former cadets named in the case summaries in order to ask them about the

truth and accuracy of the summaries and the fairness and effectiveness of the Academy's disciplinary program, the Court would have required the Air Force to disclose that identifying information. Similarly, in *Reporters Committee*, the requesters might have obtained the requested rap sheets simply by expressing their intention to use them to investigate whether the FBI maintained accurate rap sheets or appropriately pursued all allegations of criminal activity. Under the rationale of the court of appeals in this case, a requester could obtain access to a broad range of otherwise confidential personal information maintained in the files of the government's health, welfare, selective service and veterans programs—information that is precisely of the type that the legislative history of FOIA identifies as deserving of protection under Exemption 6 (see *Department of the Air Force* v. *Rose*, 425 U.S. at 375-376). All that such a requester would be required to do is frame his request in terms of a desire to contact the individuals involved and interview them as part of an investigation into the accuracy of the government's records and the fairness or effectiveness of the administration of those governmental programs. That result would conflict sharply with the expressed congressional intent that "these files should not be opened to the public." S. Rep. No. 813, *supra*, at 9.

The Second Circuit has very recently rejected the proposed "derivative use" theory precisely because it would swallow entirely the privacy protections afforded by Exemption 6. In *Hopkins* v. *HUD*, No. 90-9269 (Apr. 1, 1991), a union had requested information from payroll records on HUD-assisted housing construction projects for the purpose of de-

termining compliance with the "prevailing wage" provisions of the Davis-Bacon Act, 40 U.S.C. 276a *et seq.* The payroll records were disclosed by HUD after the agency had "deleted all employee names, addresses and social security numbers." Slip op. 2. The court of appeals upheld the agency's redaction of this personal information (*id.* at 15 (Oakes, C.J.)):

> [D]isclosure of this information would serve the public interest only insofar as [it] would allow the union to contact individual employees, who may then dispute the accuracy of the data reflected in the records, and so reveal violations of the prevailing wage laws that HUD, through proper diligence should have detected. Were we to compel disclosure of personal information with so attenuated a relationship to governmental activity, however, we would open the door to disclosure of virtually all personal information, thereby eviscerating the FOIA privacy exemptions.

2. The "derivative use" theory is flatly inconsistent with the holding in *Reporters Committee* that disclosure is not required if the requested information *itself* "would tell us nothing *directly*" about the conduct of the government. 489 U.S. at 774 (emphasis added). See *Hopkins* v. *HUD*, slip op. 15; *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1805 (1990). The Court held in *Reporters Committee* that the deletion of personal identification information is "unquestionably appropriate" precisely because such information is "irrelevant to the inquiry into the way" the government administers its responsibilities. 489 U.S. at 773. See also *id.* at 766 n.18.

This important limiting principle is rooted in the FOIA's text and purposes. The FOIA regulates the public availability of "agency records" (5 U.S.C. 552(a)(4)(B)) that constitute the "official information" that is already in the possession of the agency and that document or govern the conduct of its official business. 489 U.S. at 772 & n.20. The FOIA is not intended to facilitate access to information outside a federal agency, even where it has some relation to that agency's work. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-154 (1980). The objective of the FOIA is to provide the public a right to know "governmental information." *Department of the Air Force* v. *Rose*, 425 U.S. at 372 (quoting H.R. Rep. No. 1497, *supra*, at 11). And, while the names and the identifying information respondents' seek are contained in agency records, even the court below recognized that such information "in and of itself" would not tell respondents anything about the government. Pet. App. 9a. Respondents' desire to use that information to obtain *nongovernmental* information from private sources in Haiti cannot justify an invasion of the important privacy interests that are protected by Exemption 6.[9] "No statement was made in Congress that the

[9] In *SafeCard Services, Inc.* v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991), the court rejected a FOIA request for the names and addresses of potential witnesses or litigants in SEC stock manipulation investigations: "The public interest in disclosure is not just less substantial, it is insubstantial. * * * [T]he type of information sought is simply not very probative of an agency's behavior or performance." See also *Reed* v. *NLRB*, No. 90-5147 (D.C. Cir. Mar. 15, 1991), where the court held that Exemption 6 authorized the N.L.R.B. to withhold the names and addresses of employees eligible to vote in a union election. The court of appeals held that *Reporters Committee*

Act was designed for a broader purpose such as making the government's collection of data available to anyone who has any socially useful purpose for it." *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 772 n.20 (quoting from Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596, 608 (1976)).

3. The court of appeals' reliance on respondents' stated plan to contact the Haitian nationals for the purpose of developing information for subsequent use in other proceedings conflicts with the express statutory policy of uniform treatment of all requesters. The FOIA provides that, upon "any request," agencies are to make their records "available to any person." 5 U.S.C. 552(a)(3). No discrimination among requesters is authorized.

FOIA was designed to make it unnecessary for the government to decide in each specific instance whose request was worthy and whose was not. Before FOIA was enacted, the Administrative Procedure Act had provided that information was available only to "persons properly and directly concerned" with that information. 5 U.S.C. 1002 (1964); see *EPA* v. *Mink*, 410 U.S. at 79. FOIA removed any consideration of the personal needs of the requester from the determination of whether disclosure is required. As this Court held in *Reporters Committee*, "whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." 489 U.S. at 771. Rather, "any member of

controlled, since the data sought by the requester revealed nothing directly about agency conduct. Slip op. 5.

the public is entitled to the same disclosure." *Id.* at 775.[10]

An approach that turns upon a proposed use for the government records, rather than on the intrinsic informational value of the records, would introduce unworkable speculation and complexity into the application of Exemption 6. In this case, for example, an accurate weighing of the asserted public interest in respondents' proposed endeavor would require an assessment of the likelihood that some number of the Haitian nationals would consent to be interviewed by respondents and, further, would amend their representations, and that respondents would be able to show that State Department officials were aware, or should have been aware, of this potential for recantation. The federal personnel who must evaluate the enormous volume of FOIA requests in the first instance cannot reasonably be expected to make the elaborate and sophisticated judgments inherent in the "derivative use" analysis required by the decision of the court below. There is, moreover, no principled basis for thrusting the agencies and the courts into the analytical morass of discerning the competency, resources, and motives of individual requesters. Congress did not intend that the "equally important" protection of privacy interests under Exemption 6 should depend upon on such an improbable calculus.

Nor has this Court sanctioned such an analysis in its prior decisions. Instead, the Court has concluded that the disclosure of the names of persons that are

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[10] See also *Durns* v. *Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access [under the FOIA] to agency records."), vacated and remanded on other grounds, 486 U.S. 1029 (1988).

contained in documents located in the government's files reveals nothing about the conduct of government. Because the disclosure of such personal information does not advance the objectives of the FOIA, it "should come as no surprise" that this Court has never ordered the release of such information. 489 U.S. at 774-775 & n.21.

II. EVEN IF THERE WERE SOME COGNIZABLE "PUBLIC INTEREST" IN THE IDENTITIES OF THE HAITIANS WHO WERE INTERVIEWED, THE SEVERE INTRUSION ON PERSONAL PRIVACY THAT WOULD RESULT FROM DISCLOSURE WOULD BE CLEARLY UNWARRANTED

Because there is no valid public interest recognized by FOIA in the disclosure sought by respondents in this case, inquiry into the *degree* of the privacy invasion that would occur should be unnecessary. Any invasion of privacy in these circumstances would be clearly unwarranted: "We need not linger over the balance: something, even a modest privacy interest, outweighs nothing every time." *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 879.

The disclosure of a person's identity in a specific factual context within a government document is itself a significant invasion of personal privacy that courts have proscribed under Exemption 6. The fact that the person who requests the documents has a desire to make some further use of that personal information does not suffice to require disclosure—if anything, it heightens the invasion of privacy. Thus, for example, the disclosure of a bare list of names and addresses maintained in a file possessed by the federal government will not be required, even though it would subject those listed to no more than "an unwanted

barrage of mailings and personal solicitations" of a commercial or charitable nature. See *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 876 (quoting *Minnis* v. *Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984)). This principle applies even where the nature of the information provided about the listed individuals is apparently innocuous or benign. *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d at 874 (status as retirement-eligible federal employee); *FLRA* v. *Department of the Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989) (membership in employment bargaining unit), cert. denied, 110 S.Ct. 863, 864 (1990); *Ripskis* v. *HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (favorable employee evaluations); *Minnis* v. *Department of Agriculture*, 737 F.2d at 785 (users of federal park land potentially interested in lodging accommodations); *AFGE, Local 1923* v. *HHS*, 712 F.2d 931, 932 (4th Cir. 1983) (membership in employment bargaining unit); *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136-137 (3d Cir. 1974) (recipients of licenses to produce wine for home consumption potentially interested in winemaking equipment). These decisions flow from the bedrock concept of privacy that underlies Exemption 6—"the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See also *Reporters Committee*, 489 U.S. at 752; *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 529 (6th Cir.), cert. denied, 469 U.S. 1034 (1984).

The impact of the disclosure sought by respondents in this case is vastly more severe than the privacy interests protected in the ordinary name-and-address

case. A far greater intrusion than a barrage of junk mail, or an unwanted telephone solicitation or a salesman's visit, is at stake. The privacy interest in protecting the names of the Haitian interviewees arises in an unusually sensitive setting, for disclosure of the individual Haitians' names would immediately and publicly identify them as persons who cooperated with the United States government on a confidential basis by furnishing information concerning the Haitian government, and the treatment that Haiti has offered its own citizens, on a matter of international concern. As the Eaves Declaration points out (J.A. 43), public disclosure of this information "would * * * subject them or their families to possible embarrassment in their social and community relationships." This guarded diplomatic understatement does not obscure the basic point that cooperation with United States officials by foreigners is not always greeted with indifference by the foreigner's government or countrymen. See *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 597 n.2 (1982) (certain Iranian leaders "have been strongly criticized in the press for their alleged ties to the United States," and "[a]ny individual in Iran * * * having American connections is looked upon with mistrust"). This is particularly so when the cooperation concerns the conduct of that foreign government in its relations with its own citizens.

Beyond the underlying fact of their cooperation with the United States in describing domestic Haitian affairs, the interview reports that were released to respondents typically contain detailed personal information about the individuals who were interviewed. The reports describe these persons' marital status, family characteristics, employment status or history,

living conditions, the circumstances of past unlawful attempts to enter the United States, and the receipt of Red Cross aid upon return.[11] Disclosure of such information quite plainly constitutes a "clearly unwarranted" invasion of privacy under this Court's cases. See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 762-775; *Department of the Air Force* v. *Rose*, 425 U.S. at 375-377; *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600-601 (1982). In no FOIA case of which we are aware has such personal information been ordered disclosed.

The purpose for which respondents seek this information adds further to the assault upon the privacy values protected by the Act. Respondents seek these names and addresses so that they can go to Haiti, track down the interviewed Haitian citizens and "check what happened" by interrogating them further (Mar. 1, 1989, Tr. 38), thereby subjecting them to contentious, involuntary involvement in respondents' disputes with the State Department. This objective, which the court below expressly approved (Pet. App. 10a), represents a profound misuse of the FOIA and a distortion of its purposes. FOIA is not meant to be used as a tool to

[11] For example, one of the State Department reports describes the interviewee as "a 33-year-old with a wife and four children * * * [;] * * * by profession a tailor [who] did not have the funds to buy materials to set up shop again." Documents lodged with the Court, page 4. Another describes an interviewee as "an unemployed 21-year-old living with his mother and five younger siblings in a one-room shack in Delmas. * * * He never went to school and has no marketable skills." *Id.* at 5. All of the reports identify the interviewees, by definition, as people who engaged in attempted unlawful entry into the United States.

extract private identities from government records for the purpose of obtaining the "involuntary personal involvement" of those persons in the respondents' investigation of government conduct, or anything else that the requesters might want to do to or with the individuals. *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 530 (6th Cir. 1984). To the contrary, this Court has admonished that the disclosure of the personal identities of persons reflected in government files is "irrelevant to the public's understanding of the Government's operation" and is not authorized under FOIA. *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. at 766 n.18.

There is another important factor that further aggravates the extraordinary invasion of personal privacy sought by respondents in this case. The Haitians were interviewed under a promise of confidentiality made by representatives of the government of the United States. Such assurances of confidentiality quite obviously heighten an individual's expectation of privacy. The release of information provided under such a pledge unquestionably "involves a greater invasion of privacy than release of information provided without such a pledge." *Washington Post Co.* v. *Department of Health & Human Services*, 690 F.2d 252, 263 (D.C. Cir. 1982). For this reason, "a government pledge of confidentiality, made in good faith and consistently honored" (*ibid.*), gives significant weight to the privacy interest to be protected under Exemption 6.

We do not contend that the mere fact that the government obtained the information under a pledge of confidentialty invariably controls the question of disclosure under Exemption 6. For example, in *Wash-*

ington Post and *Robles* v. *EPA*, 484 F.2d 843, 846 (4th Cir. 1973)—which were cited by the court of appeals for the proposition that a promise of confidentiality is *not* controlling (Pet. App. 7a-8a)—the pledges of confidentiality were both limited and uneven, and there was correspondingly less reason to believe that the pledges had led to a heightened expectation of privacy. By contrast, in this case the interviews "were conducted with the clear understanding that they would be held confidential," and the uncontradicted record establishes that this understanding was important in causing the Haitian nationals to confide in U.S. officials. J.A. 56, 62-63.

The circumstances under which the interviews were conduc'ed in this case provide a highly reasonable context for the government to have offered confidentiality.[12] The *Reporters Committee* decision strongly supports the conclusion that expectations of privacy induced by objectively reasonable assurances of confidentiality should be respected. The Court stressed in *Reporters Committee* that an important aspect of the privacy protected by the FOIA is "the

[12] Because the documents were properly classified, if the Exemption afforded to such documents had been found to be timely raised, the disclosure of this information would have been barred by Exemption 1 of the FOIA (5 U.S.C. 552 (b)(1)) as well as by Exemption 6. Exemption 1 prohibits disclosure of documents that have been properly classified pursuant to criteria established under an Executive Order "in the interest of national defense or foreign policy." 5 U.S.C. 552(b)(1)(A). After this case was commenced in the district court, the identities of the persons interviewed were classified pursuant to Exec. Order No. 12,356 as information concerning the "foreign relations or foreign activities of the United States" that involved a "confidential source." See 47 Fed. Reg. 14,876 (1982); pages 6-9, *supra*.

individual's control of information concerning his or her person," because "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'" 489 U.S. at 763-764 (quoting *Webster's Third New International Dictionary* 1804 (1976)). When an individual voluntarily furnishes personal information to the government in reliance on a promise that it will be "restricted" to government use and not be "freely available to the public," a due regard for the individual's right not to have given that information in the first place should be given great weight. Private individuals, speaking on terms of confidence with representatives of our Department of State, would reasonably anticipate that "[g]reat nations, like great men, should keep their word." *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984).[13]

The privacy interests in this case fall within the core of the protection afforded by Exemption 6. The State Department has made a responsible disclosure of the information that relates to the conduct of government. Indeed, all of the records sought were

[13] The State Department has broad responsibilities for monitoring human rights violations in other nations. See page 2, *supra*. Those efforts play an instrumental role in the enforcement of our own laws as well, such as those governing refugee and asylum applications. See 8 U.S.C. 1157, 1158. The credibility of the United States would be damaged by release of the names of persons who cooperated under pledges of confidentiality, with the result of "impairing the government's ability to obtain information about conditions and events in foreign countries generally, and * * * inhibiting the government's ability to anticipate and evaluate accurately changes in the local political scene which may have international ramifications." J.A. 63-64.

provided after the names and identifying information were redacted. Disclosure of the names of the Haitians who were interviewed under assurances of confidentiality would be irrelevant to the understanding of our government's operations and would plainly invade the privacy of the Haitian returnees. It should not be required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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